Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–61 OF 2001
MOKHTAR SIDIN, DENIS ONG JJCA AND ZULKEFLI MAKINUDIN J
14 APRIL 2005

Administrative Law — Rules of natural justice — Trade Union — Application for recognition by trade union — Failure to give reasons for recognition of trade union — Automatic rejection of secret ballot exercise due to department's policy — Whether breach of procedural fairness

Labour Law — Trade Union — Recognition — Membership in trade union — Whether by way of verification of membership or secret ballot — Whether breach of legitimate expectation in not conducting secret ballot exercise as requested by appellant club

Labour Law — Trade Union — Recognition — Membership in trade union — Whether temporary workers to be excluded from scope of representation of trade union

The second respondent, a trade union, sought recognition from the appellant in respect of employees of the appellant who had become its members. The appellant requested a secret ballot to be taken to establish whether a majority of its employees were members of the second respondent at the material time. The Director of Trade Union ('DGTU') however informed the appellant and the second respondent that a membership verification exercise would be undertaken instead to ascertain the percentage of members in the second respondent. Noreasons were given as to why a secret ballot was not carried out. Pursuant to the verification exercise, the Director General of Industrial Relations ('DGIR') advised the appellant to accord recognition to the second respondent. The first respondent ordered the same. The High Court dismissed the appellant's application for order of certiorari to quash the decision of the first respondent ordering the appellant to accord recognition to the second respondent as a trade union. The appellant relied on the following grounds in seeking an order of certiorari to quash the decision of the first respondent: (1) illegal exclusion of temporary employees from scope of representation of the second respondent; (2) breach of the principles of natural justice and procedural unfairness; (3)the deprivation of the appellant's legitimate expectation; and (4) perverse and unreasonable exercise of discretion.

Held, allowing the appeal and quashing the order of recognition of the second respondent made by the first respondent:

(1) The learned judge of the High Court had erred in law in holding that the appellant should have made both the DGTU and DGIR as parties to the proceedings. In the present instance the challenge was against the first respondent's decision to accord recognition to the second respondent. In concluding that the action had been brought against the wrong party,

the learned judge had erred in law in that the DGTU and DGIR have no power to accord recognition to the second respondent. Hence it would be erroneous to name them as parties to the action. The decision of the first respondent was premised on adopting the decisions of the DGTU and DGIR without actually applying his mind to the material before him. Accordingly if the decision-making process was flawed, then it was the decision of the first respondent that was opened to challenge (see para 3).

(2) It would be illegal to exclude temporary employees from the scope of representation of the Union, in fact no distinction is made between temporary, casual or permanent employees. In light of the fact that the appellant had contended that temporary and casual workmen were to be included in the scope of representation of the second respondent's and the union's stance in adopting the opposite view, it was a condition precedent for the first respondent to ascertain the number and categories of workmen within the scope of representation of the second respondent before determining the secondary issue of whether to accord recognition (see para 10).

(3) The DGTU had based its decision solely on the original incomplete list of employees and refused to consider the revised list submitted by the appellant when it had been directed to do so by the DGIR. Its refusal for doing so was premised on the second respondent's assertion that temporary and casual employees were not within the scope of representation of the second respondent. Without even according the appellant the opportunity to be heard, the DGTU arbitrarily decided that the second respondent's assertion must be accepted and dismissed the second list submitted by the appellant. At the very least, the DGTU was obligated statutorily to verify whether the employees in the amended list were employees within the scope of representation. The failure of the DGTU to include the temporary and casual employees in the verification exercise was an error committed in breach of the provisions of the Trade Unions Act 1959 and the Industrial Relations Act 1967 and this nullified the entire recognition exercise (see para 13).

(4) The fact that the DGTU automatically rejected the appellant's request for a secret ballot on account of the fact that there was no joint request by the parties for a secret ballot was a perverse and unreasonable exercise of the discretion as to how to conduct the membership check. The provisions of the Trade Union Regulations 1959 do not prescribe that a secret ballot should only be undertaken if there was a joint request by the parties (see para 18).

(5) The first respondent, in agreeing and adopting the decision of the DGTU, and in making an order of recognition under s 9 of the Industrial Relations Act 1967 had acted in breach of the appellant's legitimate

expectation that a secret ballot be conducted to determine the membership of the second respondent (see para 21). It is of paramount importance to ensure that all the affected employees of the appellant have a right to state their choice through secret ballot as to whether they elect to be members of the second respondent and therefore assign their contracting right to the second respondent (see para 22).

(6) The failure of the first respondent to give reasons for his order of recognition and for adopting the recommendations of the DGTU and the DGIR violated the rules of procedural fairness (see para 28), and was grossly inconsistent with the principles of fairness guaranteed under art 8 of the Federal Constitution. The decision of the first respondent was therefore, fundamentally flawed and should be quashed (see para 29).

[**Bahasa Malaysia summary**

Responden kedua, sebuah kesatuan sekerja, memohon pengiktirafan dari perayu berhubung dengan semua pekerja perayu yang telah menjadi ahlinya. Perayu meminta agar satu undian rahsia diadakan untuk menentukan sama ada majoriti dari pekerja-pekerjanya adalah ahli responden kedua pada masa matan itu. Pengarah Besar Kesatuan Sekerja ('PKS') sebaliknya memberitahu perayu dan responden kedua bahawa satu penentusahan ahli akan diadakan untuk menentukan peratusan ahli di dalam responden kedua. Tiada sebab-sebab diberikan kenapa undian rahsia tidak diadakan. Mengikut penentusahan tersebut, Pengarah Besar Perhubungan Perindustrian ('PBPI') menasihatkan perayu untuk memberi pengiktirafan kepada responden kedua. Responden pertama oleh itu memberikan pengiktirafan tersebut. Mahkamah Tinggi menolak permohonan perayu untuk perintah certiorari membatalkan keputusan responden pertama yang memerintahkan perayu untuk memberi pengiktirafan kepada responden kedua sebagai sebuah kesatuan sekerja. Perayu bergantung kepada alasan-alasan berikut dalam memohon perintah certiorari membatalkan keputusan responden pertama: (1) pengecualian yang tidak sah berhubung dengan pekerja sementara dari skop representasi responden kedua; (2) pengingkaran prinsip keadilan asasi dan ketidakadilan prosedur; (3) kelucutan harapan sah perayu; dan (4) penggunaan budibicara yang tidak wajar.

Diputuskan, membenarkan rayuan dan membatalkan perintah pengiktirafan responden kedua yang dibuat oleh responden pertama:

(1) Yang arif hakim Mahkamah Tinggi telah khilaf dari segi undang-undang dalam memutuskan yang bahawa perayu patut menjadikan kedua-dua PKS dan PBPI sebagai pihak-pihak dalam prosiding ini. Dalam kes semasa, bantahan adalah terhadap keputusan responden pertama memberi pengiktirafan kepada responden kedua. Dalam memutuskan yang tindakan ini dibawa terhadap pihak yang salah, yang arif hakim telah khilaf dari segi pada undang-undang kerana PKS dan PBPI tidak mempunyai kuasa

untuk memberi pengiktirafan kepada responden kedua. Dari itu, ianya salah untuk menamakan mereka sebagi pihak-pihak dalam tindakan ini. Keputusan responden pertama adalah berdasarkan keputusan PKS dan PBPI tanpa menggunapakai mindanya kepada material di hadapannya. Oleh yang demikian, jika proses membuat keputusan cacat maka keputusan responden pertama boleh juga dipertikaikan (lihat perenggan 3).

(2) Adalah salah di sisi undang-undang untuk mengecualikan pekerja-pekerja sementara dari skop representasi Kesatuan Sekerja, malahan tiada perbezaan di antara pekerja-pekerja sementara, sambilan dan tetap. Berdasarkan fakta bahawa perayu telah menyatakan bahawa pekerja-pekerja sementara dan sambilan perlu dimasukkan di dalam skop representasi responden kedua dan pandangan kesatuan sekerja yang adalah sebaliknya, ianya menjadi satu pra-syarat kepada responden pertama untuk menentukan bilangan dan kategori pekerja di dalam skop representasi responden kedua sebelum memutuskan isu kedua sama ada untuk memberi pengiktirafan (lihat perenggan 10).

(3) PKS telah membuat keputusannya hanya berdasarkan senarai asal pekerja-pekerja yang tidak lengkap dan tidak mahu menimbangkan senarai yang dikemas kini yang dikemukakan oleh perayu apabila ia diarahkan berbuat demikian oleh PBPI. Keengganannya berbuat demikian adalah didasarkan kepada pernyataan responden kedua yang pekerja-pekerja sementara dan sambilan tidak termasuk di dalam skop representasi responden kedua. Tanpa memberi peluang kepada perayu untuk didengar, PKS sewenang-wenangnya memutuskan yang pernyataan responden kedua mestilah diterima dan menolak senarai kedua yang dikemukakan oleh perayu. Sekurang-kurangnya, PKS berkewajipan secara statutori untuk menentusahkan sama ada pekerja-pekerja di dalam senarai yang terpinda itu adalah pekerja-pekerja di bawah skop representasi. Kegagalan PBPI untuk memasukkan pekerja-pekerja sementara dan sambilan di dalam penentusahan itu adalah satu pengingkaran di bawah peruntukan-peruntukan Akta Kesatuan-Kesatuan Sekerja 1959 dan Akta Perhubungan Perusahaan 1967 dan ini telah membatalkan keseluruhan pengiktirafan tersebut (lihat perenggan 13).

(4) Keputusan PKS yang secara automatik menolak permohonan perayu untuk undian rahsia kerana tiada terdapat permohonan bersama pihak-pihak untuk undian rahsia adalah satu penggunaan budi bicara yang tidak wajar berhubung dengan bagaimana keahlian ditentukan. Peraturan-peraturan Kesatuan Sekerja 1959 tidak memperuntukkan yang undian rahsia hanya boleh diadakan jika ada permohonan bersama pihak-pihak (lihat perenggan 18).

(5) Responden pertama dalam bersetuju dan menggunapakai keputusan PKS, dan membuat perintah pengiktirafan di bawah s 9 Akta Perhubungan Perusahaan 1967 telah mengingkari harapan sah perayu bahawa undian

rahsia akan diadakan untuk memutuskan keahlian responden kedua (lihat perenggan 21). Ianya sangat penting bagi memastikan yang kesemua pekerja perayu yang terlibat mempunyai hak untuk menyatakan pilihan mereka melalui undian rahsia sama ada mereka memilih untuk menjadi ahli responden kedua dan dengan itu menyerahhakkan hak-hak berkontrak mereka kepada responden kedua (lihat perenggan 22).

(6) Kegagalan responden pertama memberi alasan-alasan bagi perintah pengiktirafan dan menggunapakaikan cadangan-cadangan PKS dan PBPI adalah bertentangan dengan rukun-rukun keadilan prosedur (lihat perenggan 28), dan ianya jelas tidak konsisten dengan prinsip-prinsip keadilan yang dijamin di bawah fasal 8 Perlembagaan Persekutuan. Keputusan responden pertama dengan itu adalah cacat pada dasarnya dan wajar dibatalkan (lihat perenggan 29).]

Notes

For cases on recognition of trade unions, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1502–1520.

For cases on Trade Union, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 778–779.

Cases referred to

Hoh Kiang Ngap v Mahkamah Perusahaaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Hong Leong Equipment v Liew Fook Chuan [1996] 1 MLJ 481 (refd)
Minister of Human Resources v National Union of Hotel, Bar and Restaurant Wokers [1997] 3 MLJ 377 (refd)
Rohana v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1988] 3 MLJ 289 (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Federal Constitution arts 5, 8
Industrial Court Rules 1980 r 4(1)(c)
Industrial Relations Act 1967 ss 2, 9(1), (4C), 20(3)
Industrial Relations Regulations 1980 reg 4(1)(c)
Trade Union Act 1959 s 26(3)
Trade Union Regulations 1959 regs 62, 63, 67

Appeal from: Originating Motion No R2–25–44 of 2000 (High Court, Kuala Lumpur)

N Sivabalah (Suganthi Singam with him) (Shearn Delamore) for the appellant.
Ishak bin Bakri (Senior Federal Counsel) (Attorney General's Chambers) for the first respondent.
LG Seah (Lobo & Associates) for the second respondent.

Zulkefli Makinudin J (delivering judgment of the court): **A**

[1] This is an appeal against the decision of the learned judge of the High Court dismissing the appellant's application for an order of certiorari to quash the decision of the first respondent ordering the appellant to accord recognition to the second respondent as a trade union of workmen under s 9(1) of the Industrial Relations Act 1967 ('the Act'). Having heard the submissions of learned counsels for the respective parties we were unanimous in our decision allowing the appeal. We now give the reasons for our decision. **B**

[2] The relevant facts of this case are as follows:

(1) By a letter dated 12 August 1996, Kesatuan Pekerja-Pekerja Kelab Semananjung Malaysia ('the second respondent') sought recognition from the appellant in respect of employees of the appellant who had become its members. In the recognition claim, the second respondent sought recognition for all employees of the appellant excluding those in managerial, executive, confidential or security positions. **C** **D**

(2) On receipt of the second respondent's claim for recognition, the appellant wrote a letter dated 26 August 1998 to the Director General of Industrial Relations ('DGIR') wherein it disputed that the second respondent represented a majority of its members. The appellant further requested that a secret ballot be undertaken for purposes of establishing whether a majority of their employees were members of the second respondent at the material time. **E**

(3) By a further letter dated 26 August 1996, the appellant informed the second respondent that recognition could not be accorded as the second respondent was not the appropriate union to represent the employees of the appellant. **F**

(4) By a letter dated 16 September 1996 to the appellant, the DGIR confirmed that the second respondent had submitted a claim for recognition and requested the appellant to submit the particulars requested therein. **G**

(5) By a letter dated 16 October 1996 from the DGIR to the Director General of Trade Unions ('DGTU') which was copied to the appellant, the DGTU was requested to, *inter alia*, undertake the necessary investigations under r 4(1)(c) of the Industrial Court Rules 1980 to ascertain the percentage of membership of the second respondent as at the date of the claim for recognition. **H**

(6) By a letter dated 29 October 1996 from the DGTU to the appellant the appellant was requested to provide particulars as stipulated in the aforesaid letter. **I**

(7) The appellant duly complied with the DGTU's request. Initially the appellant submitted a list of 88 permanent employees vide their letter of 25 September 1996. The appellant subsequently included in the list the names of the temporary and casual employees of the appellant as they formed an integral-part of the appellant's operations and wore employees within the meaning of the Act as well as the scope of representation of the second respondent.

(8) By a letter dated 15 January 1997 from the DGTU to the appellant, the appellant and the second respondent were given an-opportunity to state their choice as to the manner in which the verification of members would be undertaken, ie through a secret ballot or through a membership verification exercise.

(9) The appellant vide a letter dated 20 January 1997 reiterated its request that a secret ballot be undertaken-to determine if the majority of their employees within the scope of representation of the second respondent, were members of the second respondent at the material tune.

(10) Notwithstanding the appellant's request, the DGTU by its letter dated 5 February 1997, informed the appellant and the second respondent that a membership verification exercise would be undertaken to ascertain the percentage of members in the second respondent. No reasons were given as to why a secret ballot was not carried out.

(11) By a letter dated 4 March 1997, which was copied to the appellant, the DGTU informed the second respondent that it would be undertaking a membership verification exercise at the second respondent's premises on the 5 April 1997.

(12) The appellant vide a letter dated 14 March 1997 to the DGTU once again requested that a secret ballot be undertaken for the reasons stipulated in the aforesaid letter.

(13) By a letter dated 28 March 1997, the DGIR was informed by the DGTU that a verification exercise had been conducted and that as at the date of the claim for recognition, the scope of representation of the second respondent was 72.41%.

(14) By a letter dated 10 April 1997, the DGIR informed the appellant that 72.41% of its employees within the scope of representation of the second respondent had become members of the second respondent as at 12 August 1996 and advised the appellant to accord recognition to the second respondent. No particulars were given to the appellant as to how this-percentage was arrived at.

(15) The appellant in its letter dated 23 April 1997 to the DGIR stated that it was unable to accept the decision on the membership check undertaken by the DGTU and express disappointment at the DGTU's refusal to undertake a secret ballot. The appellant inform the DGTU that in the circumstances, it was unable to accord recognition to the second respondent. In the aforesaid letter the appellant expressed doubt that 392 employees of the appellant could have been members of the second respondent as at 12 August 1996.

(16) By a letter dated 15 May 1997 to the second respondent, the DGIR exercised his powers under reg 4(1)(c) of the Industrial Relations Regulation 1980 and requested that the DGTU conduct a membership check once again to ascertain the number and categories of employees within the scope of representation of the second respondent in light of the appellant's assertion that as at 12 August 1996, ie the second respondent's claim for recognition, it had 541 employees.

(17) Contrary to the DGIR's directive, the DGTU refrained from conducting a membership check and instead informed the DGIR that the result of the membership verification exercise which had been conducted earlier based on 88 permanent employees of the appellant remained. The DGTU also informed the DGIR that the verification exercise had excluded temporary employees as it had been informed by the second respondent that it only accepted permanent employees as its members.

(18) The second respondent replied by letter dated 12 June 1997 wherein it, *inter alia*, disputed the number and categories of employees by the appellant and requested to expedite action under s 9(4C) of the Act.

(19) The DGIR vide letter dated 12 September 1998 instructed the appellant to accord recognition to the second respondent

(20) By letter dated 24 March 2000 the appellant was informed that the first respondent had decided that the appellant accorded recognition to the second respondent with effect from 12August 1996.

[3] At the outset we would like to state here that the learned judge of the High Court had erred in law in holding that the appellant had sued the wrong parties in this case. We find it necessary to address this issue first having noted that the teamed judge in his grounds of judgment had taken the view that since the appellant had laid its challenge on the various steps taken and decisions made by the DGTU and DGIR the appellant should have made both the DGTU and DGIR as parties to the proceedings. The learned judge on that premiss had made a finding that he would have to dismiss the appellant's

application against the respondents as being misconceived since the wrong parties had been sued. With respect to the, learned judge's finding, in the present instance the challenge is against the first respondent's decision to accord recognition to the second respondent. In concluding that the action had been brought against the wrong party, the learned judge had erred in law in that the DGTU and DGIR have no power to accord recognition to the second respondent. Hence it would be erroneous to name them as parties to the action. The decision of the first respondent was premised on adopting the decisions of the DGTU and DGIR without actually applying his mind to the material before him. Accordingly if the decision-making process is flawed, then it is the decision of the first respondent that is opened to challenge.

[4] We shall now deal with the merits of the appeal. The appellant has relied on a number of grounds in seeking an order of certiorari to quash the decision of the first respondent which can be broadly categorised as follows:

(i) Illegal exclusion of temporary employees from scope of representation of the second respondent;

(ii) breach of the principles of natural justice and procedural unfairness;

(iii) the deprivation of the appellant legitimate expectation;

(iv) perverse and unreasonable exercise of discretion.

[5] The law on judicial review has been aptly summarised by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 cited with approval in the Federal Court's case of *Hoh Kiang Ngap v Mahkamah Perusahaaan Malaysia & Anor* [1995] 3 MLJ 369. Hislordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal at p 342 had this to say:

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant consideration (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

ILLEGAL EXCLUSION OF TEMPORARY EMPLOYEES FROM SCOPE OF REPRESENTATION OF THE SECOND RESPONDENT

[6] It is the appellant's contention that the entire recognition proceedings were riddled with fundamental errors in law which renders the order of recognition made by the first respondent defective and susceptible to an order of certiorari. Before we examine whether there are errors in law committed by the first respondent to warrant the issuance of an order of certiorari, it is crucial for us to appreciate the legal repercussions that ensue from the order of the first respondent ordering the appellant to accord recognition to the second respondent.

[7] The order of recognition made under s 9 of the Act would result in a trade union contracting on behalf of its members employed by the appellant for new or different terms and conditions of employment. This takes place in the form of collective bargaining. The expression 'collective bargaining' is defined in s 2 of the said Act as negotiating with a view to the conclusion of a collective agreement, whilst 'collective agreement' means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties. This will clearly indicate that once a trade union of employees is accorded recognition, it contracts on behalf of all employees within its scope of representation. The order of recognition would have the effect of taking away the individual rights of non-union members and future employees to contract and to bargain on their terms and conditions of employment. The contracting rights are, therefore, transferred from the employees to the trade union. The collective agreement will subsequently bind all employees who fall within the scope of representation of the trade union irrespective of whether they are members or not.

[8] In ascertaining the status and category of workmen falling within the scope of union representation it is necessary to examine and reproduce the following relevant statutory provisions:

> Section 9(1) of the Act states that no trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:
>
> (a) managerial capacity;
>
> (b) executive capacity;
>
> (c) confidential capacity; or
>
> (d) security capacity,
>
> may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

Section 2 of the Act defines a workman as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Section 2 of the Trade Unions Act 1959 ('TU Act') defines a 'trade union' or 'union' as any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be:

(a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries; and

(b) *whether temporary or permanent*. (Emphasis added.)

[9] Based on the above mentioned statutory provisions it would be wrong to exclude workmen who do not fall within the four categories above mentioned from the scope of union representation. Clearly, it would be illegal to exclude temporary employees from the scope of representation of the Union, in fact no distinction is made between temporary, casual or permanent employees.

[10] The second respondent contends that there was no dispute within the meaning of s 9(1A) of the said Act. This is in stark contrast to its actions. In its claim for recognition the second respondent sought recognition for all employees of the appellant. However upon the appellant requesting that a membership check be conducted in respect of all 541 of its employees, the second respondent took the stance that temporary and casual workmen were excluded from the second respondent's scope of representation. It is our view that in light of the fact that the appellant had contended that temporary and casual workmen were to be included in the scope of representation of the second respondents and the union's stance in adopting the opposite view, itis a condition precedent for the first respondent to ascertain the number and categories of workmen within the scope of representation of the second respondent before determining the secondary issue of whether to accord recognition.

[11] In this case the appellant had initially furnished the DGTU with a list of 88 of its permanent employees. Subsequently the appellant forwarded a revised list including the numbers and categories of temporary and casual employees who were also within the scope of representation of the second respondent. The DGIR then directed the DGTU mat a membership check be conducted to ascertain the percentage of representation of the union. By a letter dated 28 March 1997, the DGIR was informed by the DGTU that a verification exercise had been conducted and that as at the date of the claim — for recognition, the scope of representation of the second respondent was 72.41%.

[12] By a letter dated 10 April 1997, the DGIR informed the appellant that 72.41% of its employees within the scope of representation of the second respondent had become members of the second respondent as at 12 August 1996 and advised the appellant to accord recognition to the second respondent. No particulars were given to the appellant as to how this percentage was arrived at. The appellant in its letter dated 23 April 1997 to the DGIR stated that it was unable to accept the decision on the membership check undertaken by the DGTU and express disappointment at the DGTU's refusal to undertake a secret ballot. The appellant informed the DGTU that in the circumstances, it was unable to accord recognition to the second respondent. In the aforesaid letter the appellant expressed doubt that 392 employees of the appellant could have been members of the second respondent as at 12 August 1996.

[13] By a letter dated 15 May 1997 to the second respondent, the DGIR exercised his powers under reg 4(1)(c) of the Industrial Relations Regulation 1980 and directed that the DGTU conduct a membership check once again to ascertain the number and categories of employees within the scope of representation of the second respondent in light of the appellant's assertion that as at 12 August 1996, ie, the second respondent's claim for recognition, it had 541 employees. Notwithstanding the direction of the DGIR, the DGTU nevertheless in ascertaining the percentage of membership excluded the category of temporary and casual employees in its determination. It is our finding that the DGTU had based its decision solely on the original incomplete list of employees and refused to consider the revised list submitted by the appellant when it had been directed to do so by the DGIR. Its refusal for doing so was premised on the second respondent's assertion that temporary and casual employees were not within the scope of representation of the second respondent. Without even according the appellant the opportunity to be heard, the DGTU arbitrarily decided that the second respondent's assertion must be accepted and dismissed the second list submitted by the appellant. We would think at the very least, the DGTU was obligated statutorily to verify whether the employees in the amended list were employees within the scope of representation. It is our view that the failure of the DGTU to include the temporary and casual employees in the verification exercise was an error committed in breach of the provisions of the Trade Unions Act 1959 and the Industrial Relations Act 1967 and this nullified the entire recognition exercise.

[14] In this case we also noted that quite apart from the exclusion of the temporary workmen from the scope of union representation, the appellant from the outset when served with a claim for recognition had requested for a membership check to be conducted by way of secret ballot and had furnished its reasons for such preference. The second respondent on the other hand failed to provide any reasons for its choice of the membership check. Notwithstanding the appellant's request, the DGTU by its letter dated 5 February 1997 informed the appellant and the second respondent that it would be undertaking a membership verification exercise to ascertain the percentage of members in

the second respondent. No reasons were furnished at this juncture as to why a membership verification exercise had been preferred.

[15] Upon receipt of the DGTU's letter the appellant reiterated its request for a secret ballot to be conducted by a letter dated 14 March 1997 to the DGTU for the following reasons:

(i) that most of their employees that had signed the membership forms did not know what they had signed';

(ii) those that had signed the forms initially did not wish to join the union;

(iii) there could be some false signatories;

(iv) some of the employees had been coerced to sign the application forms.

[16] It is to be noted that under the Trade Union Regulations 1959, amembership check may be carried out by two methods, that is by way of secret ballot and verification exercise. Under reg 62 of the Trade Unions Regulations 1959, the term 'secret ballot' and 'membership verification exercise' are defined as follows:

> 'Secret ballot' means a secret ballot taken under these Regulations for the purpose of determining the percentage of workmen or any class of workmen in respect of whom a claim for recognition is being sought, who are members of the union making the claim.
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> 'membership verification exercise' means an exercise for verification of membership through checking membership application forms and other relevant records kept by a trade union of workmen which has made a claim for recognition.

[17] The repeated request for a secret ballot by the appellant was dismissed off handedly without any reasons and the same stand was adopted in toto by the first respondent, notwithstanding the fact that he has the powers under s9 of the Act to reassess the materials placed before him. We noted that the DGTU's basis for opting for a membership verification exercise is premised on the policy of its department. However this policy does not emanate from any legislature or statutory guidelines. Section 26(3) of the TU Act provides where a trade union of workmen has served a claim for recognition under the Industrial Relations Act 1967, the Director General may, at the request of the Director General for Industrial Relations, carry out a membership check in such manner as may be prescribed by regulations in order to ascertain the percentage of workmen or any class of workmen, in respect of whom recognition is being sought, who are members of the union making the claim. More important is reg 63 of the Trade Union Regulations 1959 which stipulates that the DGTU has the choice to conduct a membership check by way of secret ballot and if so, he may notify the union or the employer that a secret ballot would be held. The provision of the said reg 63 is reproduced as follows:

(1) for the purpose of conducting a membership check under s 26(3) of the Act, the Director General may by notice in writing, notify the trade union of workmen making the claim for recognition that a membership verification exercise shall be conducted, or *notify the employer upon whom the claim for recognition has been served that a secret ballot shall be taken*, as the case may be, in accordance with such directions as the Director General may specify in such notice. (Emphasis added.)

[18] It is our view the fact that the DGTU automatically rejected the appellant's request for a secret ballot on account of the fact that there was no joint request by the parties for a secret ballot is a perverse and unreasonable exercise of the discretion as to how to conduct the membership check. The provisions of the Trade Union Regulations 1959 do not prescribe that a secret ballot should only be undertaken if there was a joint request by the parties. Had this been the intention of the legislature, then no such choice or discretion would have been vested in the DGTU at the first instance. It is also our view had it been the policy of the department to proceed by way of a membership verification exercise, it was superfluous to have issued the letter of 15 January 1997 requesting the parties to state their preferred choice as to the method for membership check. More importantly, we noted that this policy of the department runs contrary to the stand that the DGTU and first respondent took in the case of *Minister of Human Resources v National Union of Hotel, Bar and Restaurant Workers* [1997] 3 MLJ 377. In that case, the company sought for a secret ballot to be conducted. The union on the other hand requested for a membership verification exercise. Despite this the DGTU proceeded by way of a secret ballot. When the Minister of Human Resources rejected the recognition claim, based on secret ballot, the Union successfully quashed the decision in the High Court. The Minister appealed to the Court of Appeal and successfully argued that the decision to go by way of secret ballot was reasonable. The Court of Appeal endorsed the Minister's decision and held that the secret ballot was the most democratic way of determining the choice of the employees.

[19] By reasons of the foregoing, it is our finding that there was a glaring absence of any consideration to the matters raised by the appellant as to why a secret ballot was the more appropriate mechanism to conduct the membership check. The exercise of the DGTU's discretion in the present case before us was a complete reverse to the stand taken by him in the Court of Appeal's case of *Minister of Human Resources v National Union of Hotel, Bar and Restaurant Workers*. The DGTU's decision adopted by the first respondent cannot be allowed to stand as the manner in which the decision was reached was unreasonable, perverse and unjustified.

DEPRIVATION OF LEGITIMATE EXPECTATION

[20] By virtue of the DGTU's letter of 15 January 1997 to the appellant it it our view that the appellant had acquired a legitimate expectation that a

secret ballot would be carried out instead of verification exercise as the purpose was to determine the percentage of workmen who were members of the union making the claim for recognition. A secret ballot allows members to exercise their freedom of choice as to whether they wish to assign their bargaining power and freedom of contract to the Union. In contrast, a verification exercise merely involves an examination of the records furnished by the Trade Union. More importantly a verification exercise would not be able to address the issue which had been raised by the appellant in its letter of 14 March 1997 to the DGTU to ascertain the authenticity and voluntariness of the signatories in the membership rolls. The veracity of membership check by secret ballot has been expressly tested and sanctioned by the Court of Appeal in *Minister of Human Resources v National Union of Hotel, Bar and Restaurant Wokers Semenanjung Malaysia*, where in the court confirmed that a membership check conducted by secret ballot does not produce an unfair result. In addition, the court also held that the membership check by secret ballot was perfectly valid and not *ultra vires* the Trade Union Act 1959.

[21] In the present case before us notwithstanding the second opportunity was accorded to the DGTU to verify the membership, the DGTU once again chose to ignore the reason furnished by the appellant as to why a secret ballot should be contorted. Whilst we are in agreement with the contention of the respondents that there is no statutory provision that a secret ballot be adopted, the convene is equally applicable. It is our finding that the first respondent, in agreeing and adopting the decision of the DGTU, and in making an order of recognition under s 9 of the Act had acted in breach of the appellant's legitimate expectation that a secret ballot be conducted to determine the membership of the second respondent

[22] It is our view that it is of paramount importance to ensure that all the affected employees of the appellant have a right to state their choice through secret ballot as to whether they elect to be members of the second respondent and therefore assign their contracting right to the second respondent. This right of choice is preserved under the provision of reg 67 of the Trade Union Regulations 1959, which states as follows:

> All workmen or any class of workmen, in respect of whom recognition is being sought who are in the employment of the employer on the date of claim *shall be entitled to vote in a secret ballot*. (Emphasis added.)

[23] The importance of preserving the right of choice of the affected employees of the appellant in this case is well supported by the decision in the Court of Appeal's case of *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 481 wherein it was *inter alia* held that employment is part and parcel of one's-constitutional right guaranteed under arts 5 and 8 of the Federal Constitution. The order of recognition, therefore, has a serious impact to the employees constitutional right, as it would affect their terms and condition of employment by the collective bargaining.

[24] It is our finding that based on the matters hereinbefore highlighted there appears to be a major flaw in the decision making process of the first respondent when he tamed the order of recognition in an obvious violation of the-principles of legitimate expectation of the appellant that a secret ballot be held to determine the membership status of the second respondent. Wetherefore consider this is a case in which we would be justified in making an order of certiorari to issue.

FAILURE TO GIVE REASONS FOR DECISION

[25] The law is clear that a decision-maker must adhere to the basic principles of nature justice and procedural fairness. Failure to do so will lead to a justifiable ground of intervention by a court of judicial review. The appellant had-contended that the decision of the-first respondent is flawed on the following grounds:

(a) Failure to give reasons for his order for recognition;

(b) Failure to furnish reasons for the adoption of the recommendation of the DGIR; and

(c) Failure to give reasons for the rejection of the method of secret ballot.

[26] In the case of *Rohana v Universiti Sains Malaysia* [1989] 1 MLJ 487 his lordship Edgar Joseph Jr (as he then was) held that the decision of the university in dismissing a group of lecturers was flawed as there was no reason given for the aforesaid dismissal. The learned judge in his judgment *inter alia* stated as follows:

> In the present case, it was argued, and I agree, that in a university environment, the exercise of reason and intellect are encouraged. The applicants are academics and should be told of the scope of free speech and interaction with students and why their defences were rejected. The giving of masons for decision in a situation such as this would also serve as a guide to other academics in the position of the applicants. Moreover, the applicants' livelihood was at stake. As well put by Lord Denning in *Breen's* case at p 191:
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> > If a man seeks a privilege to which he has no particular claim — such as an appointment to some post or other — then he can be turned away without a word. He need not be heard. No explanation need to be given. But if he is a person whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.
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> In certain circumstances which I have endeavored to indicate, a reasoned decision can be an additional constituent of the concept of fairness. I am satisfied that having regard to all the circumstances of the present case was such a case. The applicants are also entitled to succeed on this ground since neither the disciplinary authority nor the university council gave any reasons for their decision.

[27] In tandem with the above mentioned case, the Court of Appeal in Malaysia, more recently, has expounded a series of landmark decisions which expanded the scope of fairness in decision making process. In *Hong Leong Equipment v Liew Fook Chuan*, the Court of Appeal held that .the Minister of Human Resources has a duty to give reason if he decides to refuse to refer a representation made under s 20 of the Act. In short, it held that-procedural fairness imposed a duty on the public decision maker to give reasoned decisions.

[28] Having regard to the foregoing principles, we find that the failure of the first respondent to give reasons for his order of recognition and for adopting the recommendations of the DGTU and the DGIR violates the rules of procedural fairness. It is true that the DGIR and DGTU have a discretion to decide on the method of membership chock but misdiscretion is not unfettered and subject to the overriding principle of fairness. The first respondent, who adapted in toto the recommendations of the DGTU and DGIR gave no reasons to justify his decision either. Although the first respondent's discretion under s 20(3) of the Act is wide, such a discretion is not unlimited.

[29] The failure of the first respondent to give a reasoned decision when exercising his power under s 9 of the Act is grossly inconsistent with the principles of fairness guaranteed under art 8 of the Federal Constitution. The decision of the first respondent is, therefore, fundamentally flawed on the basis that it had violated the principles of procedural fairness guaranteed by art 8 of the Federal Constitution and should be quashed. The effect of a flaw of such nature is aptly summarised by His Lordship Gopal Sri Ram, JCA in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1988] 3 MLJ 289 wherein at p 326 His Lordship stated as follows:

> A public decision maker may not be procedurally compelled to furnish reasons for his decision. However, the absence of reason may warrant the drawing of what we call the 'Padfield inference', that is to say, the inference that there are no good reasons for the impugned decision. (See *Padfield & Ors v Minister of Agriculture, Fisheries and Food & Ors* [1968] AC 997). In other words:
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> > ... courts will take into account any reasons which the body may give for its decisions. If it gives no reasons — in a case when it may reasonably be expected to do so, the courts will infer that it has no good reason for reaching its conclusion and act accordingly.

[30] For the reasons above stated we accordingly allowed the appeal and quashed the order of recognition of the second respondent made by the first respondent. The appellant shall have the costs of this appeal and those incurred in the court below. The deposit is to be refunded to the appellant.

Appeal allowed. Order of recognition of the second respondent made by the first respondent quashed.

Reported by Loo Lai Mee